

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Comcast Cable Communications, LLC,)	
on behalf of its subsidiaries and affiliates)	CSR No. 8820-E
)	MB Docket No. 13-197
For Determination of Effective Competition in:)	
6 Washington Franchise Areas)	
To: Office of the Secretary		
Attn: Chief, Media Bureau		

REPLY TO OPPOSITION TO PETITION FOR SPECIAL RELIEF

Comcast Cable Communications, LLC (“Comcast”) hereby replies to the Opposition to Petition for Special Relief (the “Opposition”) submitted by the community of Bothell, Washington (the “City”) in the above-captioned proceeding. The Opposition advances a collection of unsupported arguments, nearly all of which have already been expressly rejected by the Commission. Because the Franchise Areas in this case are subject to effective competition and because the Opposition has failed to identify any credible basis to conclude otherwise, Comcast’s Petition should be granted without delay.

I. DBS PROVIDERS OFFER “COMPARABLE” PROGRAMMING

The City claims that the programming offered by DirecTV and Dish Network is not “comparable” to Comcast’s programming, because these DBS Providers fail to offer certain local PEG access channels.¹ There is, of course, no PEG requirement in the relevant effective

¹ See Opposition at 2.

competition regulations. Indeed, the Commission has expressly rejected similar challenges in the past. For example, in a 2009 decision, the Commission explained:

The full Commission, when it adopted the definition of “comparable programming,” was fully aware of PEG channels – it discussed both in the same decisions. If the full Commission had wanted PEG channels to be part of “comparable programming,” it would have stated so. It did not.²

More recently, the Commission confirmed, “The rule does not mention PEG channels, and we have repeatedly held that the absence of PEG channels from competing service does not disqualify its programming from being ‘comparable to cable operators’ for purposes of determining effective competition.”³

As Comcast explained in its Petition, the Commission’s rules clearly define “comparable programming” as “at least 12 channels of video programming, including at least one channel of nonbroadcast service programming.” There is no question that DirecTV and Dish Network each satisfy this this straight-forward test.⁴

II. COMCAST’S OCCUPIED HOUSING AND DBS SUBSCRIBERSHIP DATA FOR THE FRANCHISE AREAS IS ACCURATE AND RELIABLE

The City argues that Comcast erred in relying on housing unit data from the 2010 Census and should have instead identified “a more current data source, such as commercial data sources, to establish 2013 household occupancy in the City.”⁵ This argument is without merit.

² *Cablevision of Oakland, Inc. and CSC TKR Inc., Petition for Determination of Effective Competition in Four Communities in New Jersey*, 24 FCC Rcd. 1801, ¶ 7 (2009).

³ *Comcast Cable Communications Petition for Determination of Effective Competition in Six Michigan Communities*, 26 FCC Rcd. 3993, ¶ 5 (2011).

⁴ 47 C.F.R. § 76.905(g).

⁵ Opposition at 3.

The Commission has consistently approved cable operators' reliance on the most recent Census data available in effective competition cases, and it has upheld such use long after that data was compiled.⁶ Although the Commission has indicated that it will consider more recent household data, it does so only if the alternative data presented by the local franchising authority is "demonstrated to be reliable."⁷ In this case, the Opposition does not offer any such "updated" data.

The City mistakenly relies on a 1994 decision involving the "Low Penetration Test," to argue that the DBS subscriber data submitted by Comcast should be rejected because it is more than two months old and does not account for recent DBS cancellations.⁸ In fact, the Commission more recently found that 60-day requirement was *only* applicable to a cable operator's own subscriber numbers under the Low Penetration Test, and *not* to DBS subscriber data under the Competing Provider Test.⁹

⁶ See, e.g., *Time Warner Cable, Inc. Petition for Determination of Effective Competition in Nine Franchise Areas in New Jersey*, 25 FCC Rcd. 5457, ¶ 11 (2010) ("*Time Warner Cable- 9 New Jersey Franchise Areas*") (The Commission upheld cable operator's use of the most recently available Census household data in determining DBS penetration for the communities at issue); *Comcast Cable Communications, LLC, Petitions for Determination of Effective Competition in 107 Franchise Areas in New Jersey*, 24 FCC Rcd. 1780, ¶ 13 (2009) ("[W]e conclude that the [Rate Counsel's] general allegations about the timeliness of the [household and DBS] data submitted by Petitioner reveal no flaw in the petitions."); *Texas Cable Partners, LP*, 16 FCC Rcd. 4718 (2001) (accepting 1990 Census data until the 2000 replacement data becomes available).

⁷ See, e.g., *Bright House*, 20 FCC Rcd. 16823, ¶ 10 (2005), citing *In the Matter of Adelphia Cable Communications*, 20 FCC Rcd. 4979, 4982 (2005); *In the Matter of MCC Iowa LLC*, 2005 WL 2513517 (2005).

⁸ See Opposition at 3-4 (citing *In the Matter of Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd. 3656 (1994)).

⁹ See *Time Warner Cable- 9 New Jersey Franchise Areas* at ¶¶ 19-20.

The City also mistakenly relies on evidence of *nationwide* DBS subscribership changes without any evidence of DBS subscribership changes in any of the Franchise Areas.¹⁰ Effective competition determinations, of course, are made on a community-specific basis. In any event, the *de minimis* changes identified by the City do not suggest any significant shift in DBS subscribership at a national level, let alone a local level. The City's evidence fails to demonstrate any need for Comcast to refresh its analysis.

III. COMCAST PROVIDED THE DATA NECESSARY TO SUPPORT A FINDING OF EFFECTIVE COMPETITION IN THE CITY

The City claims that Comcast's Petition is deficient because it "contains redacted data and fails to provide any maps or evidence that support the calculation of Frontier, Dish and DirecTV subscriber penetration in the City."¹¹ But the City has failed to pursue an existing Commission process designed to allow access to the confidential data – and it provides no other basis for the Commission to reject Comcast's evidence.

To establish the presence of effective competition in the City, Comcast requested that Frontier Communications Northwest, Inc. ("Frontier") provide Comcast with the number of Frontier cable subscribers in the City.¹² Frontier ultimately agreed to provide the competing cable subscriber data to Comcast *only* if such data were subject to a confidentiality agreement.¹³

¹⁰ See Oppositions at 4.

¹¹ *Id.*

¹² See Letter from Frederick W. Giroux, Counsel for Comcast Cable Communications LLC to Jeanne Danielson, General Manager, Frontier Communications dated January 11, 2012, attached hereto as Exhibit 1 (Attachment Omitted).

¹³ See Letter from Brendon M. Pinkard, Counsel for Frontier Communications to Mr. Steven Horvitz, dated February 1, 2013, attached hereto as Exhibit 2 (Attachment Omitted).

Pursuant to Commission precedent, a local exchange carrier, such as Frontier, may require a confidentiality agreement to protect its subscribership data from public disclosure, but parties, such as the City, may gain access to such data under a protective order.¹⁴ The Commission should reject the City's objection, because it appears that the City has means at its disposal to obtain Frontier's confidential data, but did not seek to avail itself of those means.¹⁵ Accordingly, the City's argument that it was precluded from evaluating the veracity of Frontier's subscriber data is unavailing.¹⁶

Comcast also included local DBS subscribers in its Petition, and it redacted this SBCA-provided data from the City's service copy solely to honor its confidentiality obligations to Frontier. Had the City resolved the confidentiality issue with Frontier, the DBS subscriber counts would have been immediately available to it. In any event, the Opposition does not even attempt to challenge the community-specific ZIP+4 data that was obtained from SNL Kagan,¹⁷

¹⁴ See, e.g., *Time Warner Cable Inc. for Subscribership Information Pursuant to Section 76.907(c) of the Commission's Rules*, 26 FCC Rcd. 5103 (2011); *Comcast Cable Communications, LLC, Petitions for Determination of Effective Competition in 41 Communities in Pennsylvania*, 28 FCC Rcd. 3375 n.16 (2013). In *Comcast Cable Communications, LLC*, 27 FCC Rcd. 15940 (2012), the Commission accepted Comcast's effective competition filing containing confidential Verizon subscriber information, and subsequently facilitated a protective order between Verizon and the Division of Rate Counsel of the State of New Jersey (the "DRC") that allowed the DRC to review Verizon's confidential data.

¹⁵ Although Comcast was not in a position to release Frontier's confidential information, the City did not even bother to ask Comcast for the data or how it might go about obtaining it.

¹⁶ The City does not identify any reason why Frontier would provide inaccurate subscriber numbers to benefit Comcast in this proceeding. Moreover, notwithstanding the City's own direct regulatory relationship with Frontier, the City does not present a local subscriber count for Frontier that the Commission could compare to the Frontier subscriber figure included in Comcast's Petition.

¹⁷ Comcast's Petition carefully describes how SNL Kagan matched ZIP+4 codes to the City's boundaries and how SBCA then provided the associated subscriber counts. See Petition at 6-8, Exhibits 6 and 8. Exhibit 6 to the Petition identifies (on a *non*-redacted basis) each of the Zip+4 codes associated with the City.

shared with the City, and used by SBCA to identify local DBS subscribers. SNL Kagan's ZIP+4 analysis and SBCA's subscriber reporting have, of course, been relied upon by cable operators and approved by the Commission in hundreds of effective competition cases.¹⁸ The City fails to provide any basis to reject this well-established approach in the current proceeding.

IV. THE CITY MISCONSTRUES THE LEGAL REQUIREMENTS REGARDING EFFECTIVE COMPETITION SHOWINGS

The Opposition ultimately contends that cable operators should not be permitted to rely on the existence of DBS subscribership as evidence of effective competition – because DBS service does not “create competition to cable service”.¹⁹ The Opposition essentially argues that the Commission has the discretion to ignore controlling statutory language and twenty years of direct Commission precedent.

Section 623(l)(1)(B) of the Communications Act specifies that effective competition will be found where the franchise area is:

- (i) served by at least two unaffiliated *multichannel video programming distributors* each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and

¹⁸ See, e.g., *Time Warner Cable Inc., Petition for Determination of Effective Competition in 19 Kentucky Franchise Areas*, DA 13-1509 (rel. Jul. 3, 2013); *Comcast Cable Communications, LLC, Petition for Effective Competition in Ten Illinois Communities*, 28 FCC Rcd. 8383 (2013); *Comcast Cable Communications, LLC, Petition for Effective Competition in 6 Communities in Washington*, 28 FCC Rcd. 7108 (2013); *Comcast Cable Communications, LLC, Petition for Effective Competition in 26 Pennsylvania Communities*, 27 FCC Rcd. 4307 (2012); *Comcast Cable Communications, LLC, Petition for Effective Competition in Two Virginia Communities*, 26 FCC Rcd. 15291 (2011); *Cablevision Systems Westchester Corp., Petition for Determination of Effective Competition in Putnam Valley, New York*, 24 FCC Rcd. 872, ¶ 13 (2009) (“ZIP+4 data such as Petitioner has presented is the most fine-grained and commonly available way of which we are aware to count DBS subscribers in a community. It does not create an automatic suspicion of inaccuracy.”)

¹⁹ Opposition at 5.

- (ii) the number of households subscribing to programming services offered by *multichannel video programming distributors* other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area.²⁰

In turn, Section 602(13) of the Act defines “multichannel video programming distributors” (“MVPDs”) specifically to include “direct broadcast satellite service.”²¹ Based on these unambiguous statutory provisions, DBS competition must be considered in this proceeding. Contrary to the City’s suggestion, Congress *did not* leave open to Commission discretion whether DBS service should or should not be counted under the Competing Provider Test.

The City’s argument for disregarding DBS competition not only conflicts with the governing statutory language, it also ignores repeated Commission decisions denying this same challenge to effective competition petitions.²² In a 2010 decision, the Commission clearly ruled:

[C]oncerning the . . . general objection that DBS should not provoke deregulation of rates for basic cable service, the statute generally defines the class of cable competitors as MVPDs, and specifically defines DBS operators as an MVPD. *We have no authority to alter the statute* and, therefore, we may not exclude DBS providers from the class of MVPDs that we consider in the competing provider test.²³

In short, the controlling statute is clear, and the Commission has properly and repeatedly ruled that it lacks discretion to entertain a contrary approach.

²⁰ 47 U.S.C. § 543(l)(1)(B) (emphasis added).

²¹ 47 U.S.C. § 522(13).

²² See, e.g., *Cablevision Systems East Hampton Corp.*, 24 FCC Rcd. 10846, ¶ 13 (2009) (“We have no authority to alter the statute and, therefore, may not exclude DBS providers from the class of MVPDs that we consider in the competing provider test.”); *CoxCom, Inc., d/b/a Cox Communications Orange County*, 22 FCC Rcd. 4522 (2007); *Comcast Cable Communications, LLC, Petition for Determination of Effective Competition in Forty-Two California Franchise Areas*, 22 FCC Rcd. 694 (2007).

²³ *Comcast Cable Communications, LLC Petition for Determination of Effective Competition in Two Communities in Maryland*, 25 FCC Rcd. 13340, ¶ 13 (2010)(emphasis added). See also *Comcast Cable Communications, LLC Petition for Determination of Effective Competition in Four Communities in Maryland*, 25 FCC Rcd. 12783, ¶ 6 (2010).

CONCLUSION

For the foregoing reasons, and based upon the clear and unrefuted evidence Comcast has submitted in this proceeding, the Commission should grant Comcast's Petition without delay.

Respectfully submitted,

Comcast Cable Communications, LLC
On behalf of its subsidiaries and affiliates

Richard A. Chapkis
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October 9, 2013

By: 

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Steven J. Horvitz
Frederick W. Giroux
DAVIS WRIGHT TREMAINE LLP
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Exhibit 1



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January 11, 2012

Jeanne Danielson
General Manager
Frontier Communications
20575 NW VonNuemann, Suite 150
Beaverton, OR 97006

Re: Frontier Communications Subscriber Figures for Various Communities in Oregon and Washington

Dear Ms. Danielson:

This law firm represents Comcast Cable Communications, LLC ("Comcast"). Comcast is seeking to demonstrate the presence of "effective competition" in various Oregon and Washington communities, as identified in the exhibit attached to this letter. Under the FCC's rules, cable operators are entitled to request subscriber information from other video providers operating in their franchise areas in connection with investigating and prosecuting an effective competition petition. The FCC recently clarified that cable operators are entitled to obtain subscriber information from LEC-affiliated MVPDs.¹ We therefore request pursuant to Section 76.907(c) of the FCC's rules that Frontier Communications provide us with the number of video subscribers that it serves in each of the Oregon and Washington communities identified in the attached exhibit as soon as possible, but in no event later than 15 days from the date of this letter.

In counting subscribers, each separately billed household should be counted as a subscriber. In accordance with FCC Rule § 76.905(c), however, where multiple dwelling units ("MDUs") are billed as a single customer, each individual unit in the MDU should be counted as a separate household subscriber.

We understand the potential sensitivity of this information and request your cooperation in responding to this request under the FCC's rules. The information that you provide will be used by this law firm solely for the purposes of preparing, filing and prosecuting a petition for effective competition at the FCC for Comcast's system(s) serving the Oregon and Washington communities listed on the attached exhibit. None of the information shall be used for any other marketing, advertising or competitive purposes.

¹ See *Time Warner Cable, Inc.*, DA 11-616, (rel. Apr. 6, 2011).

Ms. Jeanne Danielson
January 11, 2012
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Please forward the requested information directly to me. If you have any questions regarding the details of this request, please let me know as soon as possible.

Thank you for your prompt attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Frederick W. Giroux", written in a cursive style.

Frederick W. Giroux

Counsel for Comcast Cable Communications, LLC

Enclosure

Exhibit 2



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February 1, 2013

VIA COURIER

Mr. Steven Horvitz
Davis Wright Tremaine LLP
1919 Pennsylvania Avenue NW
Suite 800
Washington, DC 20006

Re: Frontier Communications Subscriber Figures for Various Communities in
Oregon and Washington

Dear Mr. Horvitz:

Pursuant to the terms of the Confidentiality and Non-Disclosure Agreement by and between Comcast Cable Communications, LLC and Frontier Communications Northwest Inc., dated February 1, 2013 (a copy of which is enclosed herewith), and in accordance with Section 76.907 of the FCC Rules, Frontier hereby submits the number of video subscribers that it serves in specifically identified Oregon and Washington communities. As provided in the Confidentiality and Non-Disclosure Agreement, the enclosed information is highly confidential and proprietary to Frontier and shall not be disclosed except as expressly set forth in the Confidentiality and Non-Disclosure Agreement.

If you would like to discuss this further or have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Brendon M. Pinkard".

Brendon M. Pinkard

Counsel for Frontier Communications

cc: Kevin Saville, Vice President & Associate General Counsel – Frontier

CERTIFICATE OF SERVICE

I, Deborah Williams, do hereby certify on this 9th of October, 2013 that a true and correct copy of the foregoing "Reply to Opposition to Petition for Special Relief" has been sent via U.S. mail, postage prepaid to the following:

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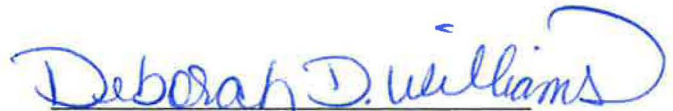
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